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IN THE

Supreme Court of the United States

October Term, 1957

No. 870

MORGAN S. STARK, *et al.*,

Plaintiffs and Respondent,

vs.

HAROLD L. SHAW, *et al.*,

Defendants and Petitioner.

Respondent's Answer to Petition for Writ of Certiorari in the Above Matter.

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable, the Associate Justices of the Supreme Court of the United States:

Respondent answers the Petition in the above-entitled matter and respectfully requests this Honorable Court to deny the same.

THIS ACTION WAS TRIED UPON THE THEORY OF A BREACH OF CONTRACT AND THE DAMAGES THAT FLOWED THEREFROM, AND WHEN REVIEWED IN THE LIGHT OF THE APPLICABLE LAW THERE IS NO CONSTITUTIONAL QUESTION INVOLVED IN THE PROCEEDINGS AS THEY WERE CONDUCTED.

Statement of Question Presented.

Petitioner has misstated the issue presented by including the "question of anticipated profits."

If petitioner would recognize and accept the theory under which the cause was tried, its argument would dissipate. The District Court of Appeal in its analysis of the situation states as follows and this paragraph is contained in page 11 of the Appendix:

> "Defendant vainly argues that the roofing company is not entitled to recover damages for loss of profits because its past operations do not afford a basis from which anticipated future profits may be ascertained. This theory is not here applicable. The problem is not whether the roofing company has made profits in the past, or whether, as a business, it will produce profits in the future; rather, the issue to be determined is whether the company was reasonably certain to make a profit under this particular contract."

ARGUMENT.

The Trial Court has the right to restrict cross-examination of any witness to matters which have relevancy to the issue being tried.

The right of cross-examination is not unlimited, but the matter is largely within the Trial Court's sound discretion and its action will not be reviewed unless it appears that its discretion was abused.

Toderow v. United States, 173 F. 2d 439, Certiorari Denied, 69 S. Ct. 1169 (Cal.);

D'Aquino v. United States, 192 F. 2d 338, Certiorari Denied, 72 S. Ct. 772 (Cal.);

Kanatser v. Chrysler Corp., 199 F. 2d 610, Certiorari Denied, 73 S. Ct. 388;

Madden v. United States, 20 F. 2d 289, Certiorari Denied, 72 L. Ed. 423.

It is also proper for the Trial Court to restrict the cross-examination to the theory upon which the cause is being tried.

This principle was announced in the case of *Miller v. Brown,* 136 Cal. App. 2d 763. In this action plaintiff sought to recover the difference between the contract price and the actual cost of construction (including extras). Cross-examination was attempted to establish that plaintiff had exceeded contract prices in other construction jobs referred to in his direct examination in establishing his professional qualifications. Objection to this cross-examination was sustained by the Trial Court and was affirmed in the District Court of Appeal, a

hearing being denied in the Supreme Court of the State of California.

The following cases support the statement that the scope of cross-examination is limited to the subject of direct examination:

Chevillard v. United States, 155 F. 2d 929;

Banning v. United States, 130 F. 2d 330, Certiorari Denied, 63 S. Ct. 434.

Petitioner cannot and does not contend that reasonable opportunity was not afforded him to cross-examine all witnesses on any evidence which related to the breach of the contract, the cost of the performance of the contract, and the difference that would remain which constituted plaintiff and respondent's damage.

Petitioner's entire argument on pages 10 and 11 under points 2 and 3 is, as was his attempted cross-examination, irrelevant for the simple reason that it does not go to the issue that was being tried.

As a matter of information only, attention is directed to the Reporter's Transcript of the testimony of both Robert Griffin, Jr., a witness produced by petitioner [Rep. Tr. p. 978, line 16, to p. 990, line 4] and the testimony of Mr. Stark, the respondent [Rep. Tr. p. 471, line 15, to p. 487, line 11]. Both witnesses testified to the costs of material, labor and all items of cost to perform the contract. The difference between this cost and the contract price was the damage for non-performance of the contract.

No limitation was placed on petitioner's right to cross-examine on this evidence and, therefore, no Constitutional right was violated.

Rule 19 of the United States Supreme Court.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Respondent respectfully contends that the above entitled case does not come within the purview of this Rule and that, therefore, a Writ of Certiorari is not a proper remedy and that even assuming the proper application of this Writ, there has been no denial of Constitutional rights, and that the Petition should be denied.

Respectfully submitted,

MURCHISON & CUMMING,

By CLAUDE B. CUMMING,

Attorneys for Respondent.